Supreme Court, U.S.
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No. 91-523

In The

Supreme Court of the United States

October Term, 1991

JULIET ELLERY,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeal of the State of California err in affirming the trial court's action in sustaining, without leave to amend, respondent's demurrer to petitioner's second amended complaint?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 4

I THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 10 STANDARD OF PRESENTING SPECIAL OR IMPORTANT REASONS FOR REVIEW 4

II THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 14 STANDARD OF ACCURACY, BREVITY, AND CLARITY 8

III THE COURT BELOW PROPERLY AFFIRMED THE TRIAL COURT'S EXERCISE OF ITS DISCRETION IN SUSTAINING THE DEMURRER WITHOUT LEAVE TO AMEND 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Brown v. Glines, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) 7

Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) 6

Cole v. Richardson, 405 U.S. 676, 92 S.Ct. 1332, 31 L.Ed.2d 593 (1972) 7

Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal.Rptr. 375, 556 P.2d 737 (1976) 9

Kennedy v. Bank of America, 237 Cal.App.2d 637, 47 Cal.Rptr. 154 (1965) 10

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 6

Stanson v. Brown, 49 Cal.App.3d 812, 122 Cal.Rptr. 862 (1975) 9

Thomas v. California Emp. Stab. Com., 39 Cal.2d 501, 247 P.2d 561 (1952) 7

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) *cert. den.*, ___ U.S. ___, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990) 6

STATUTES

United States Code
Title 29, Section 621, et seq 10

Title 42, Section 1983 6

California Evidence Code
Section 639 6

TABLE OF AUTHORITIES – Continued

Page

California Government Code
Section 12941(a) 10

Rules of the Supreme Court of the United States
Rule 10 ..... 4, 6, 8

Rule 10.1(c) 5

Rule 14 ..... 8, 9

Rule 14.1(a) 8

Rule 14.1(e) 8

Rule 14.1(g) 8

Rule 14.1(j) 8

Rule 14.5 8

Rule 16 8

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TO: THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent County of San Diego ("County"),[1] a public entity and a political subdivision of the State of

[1] Respondent disputes petitioner Juliet Ellery's identification of the parties to the proceedings below. On the cover of her petition, petitioner incorrectly lists "County Counsel, County of San Diego" as respondent. The County itself, not County Counsel, is the real party in interest and respondent. Petitioner is a former probationary employee of respondent.

California, opposes the Petition for Writ of Certiorari on the following grounds: the petition fails to meet the jurisdictional requirements of this Court. It transgresses the formal requirements of accuracy, brevity and clarity, and it ranges far beyond the scope of review of issues considered and decided below. Therefore, the County respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner seeks restoration of unemployment benefits she claims she lost when the County terminated her probationary employment as an eligibility technician with the San Diego County Department of Social Services. The termination was based upon petitioner's refusal to sign an unconditional statement of understanding that she would comply with mandatory reporting statutes for child abuse and adult abuse.

As summarized in the Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division One, upon her termination, petitioner applied for unemployment benefits, which were denied. (Petition Appendix, at 2-3.) Petitioner then appealed the denial to the California Unemployment Insurance Appeals Board ("CUIAB"). (*Id.* at 3.) Rather than seek judicial review of the CUIAB's decision by writ of mandate in superior court (*id.* at 12), petitioner filed a California Tort Claims Act claim against the County. (*Id.* at 3.)

Petitioner's original complaint sounded in tort, alleging both intentional and negligent interference with contract and

fraud. Three different superior court judges sustained demurrers against petitioner's successive attempts to plead a viable cause of action against the County. (*Id.* at 5-8.) On sustaining the second demurrer, the trial court granted petitioner leave to amend her cause of action for age discrimination only. (*Id.* at 7.) Because the facts failed to support a cause of action for age discrimination, the County successfully demurred to the second amended complaint. (*Id.* at 8.) An appeal[2], a petition for review[3], and this petition for certiorari followed.

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[2] In response to the trial court's action sustaining without leave to amend the County's demurrer to petitioner's second amended complaint, petitioner raised the following issues in her brief to the Court of Appeal:

> A. The employer's illegal *acts* are immune for a time.
>
> B. The employer saves money by *breach* of his [*sic*] duties.
>
> C. Proximate *cause* of injuries is obscured.
>
> D. The employer has a better right to *due* process.
>
> E. Factors A through D are *unequal*. . . . An avalanche of process is not due process.

(Emphasis in original.) The Court of Appeal restated the issues raised as follows:

> Ellery asserts (1) three trial courts erred in sustaining demurrers to her complaints without reasons; (2) the trial court which denied her motion for

(Continued on following page)

REASONS FOR DENYING THE PETITION

I

THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 10 STANDARD OF PRESENTING SPECIAL OR IMPORTANT REASONS FOR REVIEW

The Petition for Writ of Certiorari fails to meet the standard of rule 10 of the Supreme Court Rules. That rule provides, in pertinent part:

(Continued from previous page)

> summary judgment and sanctioned her $425 failed to comply with Code of Civil Procedure section 437c because it did so 'without a rationale'; and (3) County prevailed before the CUIAB without giving Ellery a trial.

(Petitioner's Appendix at 8-9.) The Court of Appeal found that Ellery had failed to state a cause of action in any of the three complaints and that she had failed to seek review of the CUIAB decision in the proper manner. It found further that although petitioner's initial complaint should have been dismissed, the lack of a statement of the grounds for granting the demurrers did not prejudice petitioner. (*Id.* at 11-12.)

[3] In her petition for review to the California Supreme Court, petitioner stated as her issue: "Summary Judgment Deprives Ellery of a Due Process Tort Forum." In support, petitioner listed the following arguments:

> Deprival of rights occurred under color of state law.
> Ellery raised issues promptly and appeals timely.
> Conflicting statutes create errors in this case.
> A full tort forum is equitable and limited process is not.

The California Supreme Court denied review without comment. (Petitioner's Appendix, unnumbered first page.)

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. . . .

Petitioner alleges jurisdiction to review this case under rule 10.1(c), which provides that review may be proper when:

> [A] state court . . . has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Here, the sole legal question decided in the court below was whether, under state law, petitioner stated a claim upon which relief could be granted. Petitioner has not demonstrated that the Court of Appeal decided any federal question at all in this case, much less an important question of federal law that intrudes upon unsettled territory or conflicts with applicable decisions of this Court.

Petitioner lists five "substantial federal questions" and five subsidiary questions. Only the first question appears reasonably to have been raised below in both the Court of Appeal and the California Supreme Court. (*Compare* petition at i *with* nn.2 & 3.) Moreover, none of these questions addresses the grounds of dismissal of petitioner's successive complaints, the last from which she appealed. Here, of the five "substantial" questions identified, only questions one, four, and five raise any issues remotely cognizable in federal court. Questions two and three raise issues clearly limited to state law. Therefore, issues two through five, not having been properly raised

below, or touching only issues of state law, are inappropriately addressed to this Court. (*Cf. Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).)

Under the first question, petitioner vaguely alleges unconstitutionality of "state presumption statutes on evidence, jurisdiction and final judgment" as a violation of her civil rights under 42 United States Code section 1983. This issue could be summarized as follows: whether state judicial procedures unconstitutionally deprived petitioner of a trial on the merits concerning her various complaints against the County. Petitioner claims that application of California Evidence Code section 639, the presumption that a judgment correctly determines the rights of the parties, violated her due process. Petitioner's claim is really that state procedural requirements permitting demurrers and summary judgments kept her from having her day in court. But in order to state a cause of action for a constitutional violation under section 1983, petitioner must show that state legal process was insufficient to protect her procedural due process rights. (*Parratt v. Taylor*, 451 U.S. 527, 541-544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) *cert. den.*, ___ U.S. ___, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990).) Here, petitioner fails in any understandable way to explain how state procedures have violated her civil rights and how state legal process was insufficient to protect her procedural due process rights. Therefore, petitioner has not presented an "important question of federal law" as required by rule 10.

Although not raised on appeal below, the fourth and fifth questions warrant brief comment. Under the fourth issue, petitioner claims her First Amendment right to free

speech was violated when the County terminated her during her probation for refusing to sign an unconditional statement of understanding in compliance with California child abuse and adult abuse reporting statutes. While petitioner couches this issue in the language of the First Amendment, she was but one among many County employees who were required to sign the same statements of understanding as a condition of their employment. Moreover, she fails to demonstrate how this employment requirement infringes her freedom of political expression. This Court has previously held that "a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." (*Brown v. Glines*, 444 U.S. 348, 356 n.13, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980), *citing, inter alia, Cole v. Richardson*, 405 U.S. 676, 92 S.Ct. 1332, 31 L.Ed.2d 593 (1972).) Therefore, this issue is without merit.

The fifth issue raises an equal protection argument that the County treated petitioner differently than other County employees under an unspecified contract, implied to be a collective bargaining agreement, presumably applying to both petitioner and the County. Both of these latter issues would have been appropriate to address by writ of mandate for review of the September 27, 1988 decision of the CUIAB. (See petition Appendix, at 8, 12; *Thomas v. California Emp. Stab. Com.*, 39 Cal.2d 501, 247 P.2d 561 (1952).) Petitioner declined to pursue this remedy. Therefore, this issue is not properly before the Court.

The instant petition lacks any ground upon which this Honorable Court should grant review as provided by

rule 16. Therefore, petitioner has failed to satisfy rule 10, and the petition should be denied.

II

THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 14 STANDARD OF ACCURACY, BREVITY, AND CLARITY

The Petition for Writ of Certiorari does not meet the standard of Supreme Court rule 14. This rule provides, in paragraph .5:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Rule 14 requires a "short and concise" statement of questions presented. (Rule 14.1(a).) It requires a "concise statement" of the grounds of jurisdiction. (*Id.* at subpar. (e).) It requires a "*concise* statement" of the case (*id.* at subpar. (g), emphasis in original) and a "direct and concise" argument. (*Id.* at subpar. (j).)

Petitioner's diffuse, rambling petition exudes fundamental misunderstanding of the functions of government and the roles of administrative agencies and courts. The petition fails to state any federal question that was timely and properly raised so as to give this Court jurisdiction to review the judgment. Petitioner's statement of the case is neither concise nor limited to material facts. She has failed to present with accuracy, brevity and clarity those matters essential to an adequate understanding of the points of her petition.

Petitioner's failure to pursue her listed issues in the appropriate forum and her attempt to raise them now, out of the context of the Court of Appeal's action in this case, only add to the obscurity of her petition. Therefore, petitioner has failed to comply with rule 14.

III

THE COURT BELOW PROPERLY AFFIRMED THE TRIAL COURT'S EXERCISE OF ITS DISCRETION IN SUSTAINING THE DEMURRER WITHOUT LEAVE TO AMEND

Petitioner fails to conform her petition to the scope of the issues decided below. Rather, at each stage of the proceedings in this case, she has modified the issues to suit her personal interpretation of them. The trial court gave petitioner ample opportunity to amend her complaint to state a cause of action. When it became apparent that she could not, the trial court sustained the County's third demurrer without leave to amend.

Under California law, petitioner had the burden below of proving that either the demurrer was erroneously sustained or that the trial court abused its discretion in sustaining the demurrer without leave to amend. (*Stanson v. Brown*, 49 Cal.App.3d 812, 814, 122 Cal.Rptr. 862 (1975).) If she could not show a reasonable possibility that she could amend the complaint to state a cause of action, in what manner she could amend it, and how the amendment would change the legal effect of the pleadings, then the court did not abuse its discretion by refusing to permit further leave to amend. (*Goodman v.*

Kennedy, 18 Cal.3d 335, 349, 134 Cal.Rptr 375, 556 P.2d 737 (1976).)

In *Kennedy v. Bank of America*, 237 Cal.App.2d 637, 650, 47 Cal.Rptr. 154 (1965), the court stated:

> We . . . conclude that the court did not abuse its discretion in sustaining the demurrer without leave to amend because plaintiff had, in the first complaint and in the first amended complaint, attempted to state a cause of action without success. Three opportunities should suffice. [Citations omitted.]

Petitioner had multiple opportunities to support her claim of employment discrimination, but she failed to do so following two previously successful demurrers. In particular, the second amended complaint identified petitioner as belonging to a class protected by statute because of her age. However, the complaint completely failed to allege any facts to support a cause of action under either California or federal laws which protect that class. Furthermore, petitioner failed to allege any facts to support proof of discriminatory purpose or intent on the County's part against either her or the protected class.

The Age Discrimination in Employment Act (29 U.S.C. § 621, et seq.) prohibits employers from discriminating because of age against employees over age 40. California Government Code section 12941, subdivision (a), makes it unlawful practice to "refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote any individual over the age of 40 on the ground of age." But it does not make unlawful "termination of employment where the individual . . . employee failed to

meet bona fide requirements for the job or position . . . held . . . . " Petitioner's second amended complaint failed to allege sufficient facts to support an action for age discrimination.

Petitioner was a probationary employee whose County employment ended during probation because she refused to comply with a County work requirement. Petitioner failed to support her allegation of discrimination based on age with any salient facts. Moreover, she was unable to show any reasonable possibility that she would have been able to state a cause of action against respondent County. Thus, the Court of Appeal did not err when it affirmed the trial court's action in sustaining respondent's third demurrer without leave to amend, dismissing the case, and denying rehearing.

CONCLUSION

The Petition for Writ of Certiorari raises neither an important question of federal law nor identifies a decision by the Court of Appeal of the State of California on an issue of federal law not settled by this Court or in conflict with applicable decisions of this Court. For the

reasons discussed herein, respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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